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No. 09-39

Supreme Court, U.S.
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In The
Supreme Court of the United States

DUFRENE BOATS, INC.,

Petitioner,

v.

NGA TRINH, INDIVIDUALLY AND ON BEHALF OF HAO TRAN AND LYNN TRAN,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana First Circuit Court Of Appeal

PETITIONER'S REPLY BRIEF

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PETITIONER'S INVOLUNTARY PAYMENT OF THE NON-PECUNIARY JUDGMENT DOES NOT MOOT THE CASE

Respondent, in her opposition brief, asserts that the Petition is moot due to a voluntary payment of the Judgment after denial of petitioner's motion to the Louisiana Supreme Court seeking to stay the execution of the judgment pending application of this Petition to the Supreme Court of the United States. Respondent's assertion is wrong.

The petitioner filed a timely Application for Writ of Certiorari to the Louisiana Supreme Court which was denied on April 13, 2009. Thereafter, petitioner filed a Motion for Stay of Execution pending Application of a Petition for a Writ of Certiorari to United States Supreme Court pursuant to Louisiana Code of Civil Procedure article 2166 E, which states:

> If an application for certiorari to the [Louisiana] supreme court is timely filed, a judgment of the court of appeal becomes final and definitive when the supreme court denies the application for certiorari. **The supreme court may stay the execution of the judgment of the court of appeal pending a timely application for certiorari or an appeal to the United States Supreme Court.** (Emphasis added).

While petitioner was preparing the Petition to this Court, the Louisiana Supreme Court denied the Motion for Stay of Execution. Petitioner received

notification via letter, dated May 27, 2009, from the Clerk of the Louisiana Supreme Court stating:

> This is to advise that the court took the following action on your Motion for Stay of Execution of Judgment Pending Application of a Petition for Writ of Certiorari to United States Supreme Court, filed in the above entitled matter.
>
> "DENIED"

The denial of the Motion for Stay of Execution did not foreclose petitioner from proceeding with its Petition to this Court. The respondent almost immediately after the denial filed a Motion for Judgment Debtor Examination with the State Court for the purpose of locating petitioner's assets and executing against those assets to pay the judgment. Petitioner involuntarily paid on June 12, 2009, the non-pecuniary judgment with knowledge by respondent that the Petition to the U.S. Supreme Court would proceed. There was never a settlement. There was never an indication petitioner abandoned its right to file a Petition with this Court.[1]

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[1] Petitioner's counsel always made it known to respondent that a Petition for Certiorari to the Supreme Court of the United States would be filed. This was known by all parties and set forth unequivocally in the Motion for Stay. Moreover, in a June 16, 2009 letter to respondent's counsel after denial of the motion for stay, petitioner's counsel stated,

> "my client paid the judgment because the Louisiana Supreme Court denied the motion to stay execution. I

(Continued on following page)

As noted in a respected treatise on Supreme Court practice, "since property or money paid or transferred involuntarily pursuant to a judgment can be reversed, the payment or transfer pending appeal or certiorari does not normally make a case moot." *See* Eugene Gressman et al., *Supreme Court Practice*, §17.3, p. 851 (9th ed. 2007). Moreover, it is recognized that a money judgment can be ordered repaid if the judgment is reversed. *Id.*, §19.3(d), p. 933; *Cahill v. New York, N.H. & H.R. Co.*, 351 U.S. 183 (1956); *see also U.S. v. Hougham*, 364 U.S. 310 (1960) (payment by defendant does not moot an appeal seeking to recover the payment). Additionally, contrary to respondent's contention, in Louisiana, a satisfaction of judgment filed while an appeal is pending does not bar the appeal if there is no evidence the appellant intended to abandon the appeal. *Vincent v. State Farm Mut. Auto Ins. Co.*, 671 So.2d 1127 (La. App. 3rd Cir. 1996).

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am still proceeding with preparation for the filing of a Petition for a Writ of Certiorari to the U.S. Supreme Court. While the Supreme Court grants a small percentage of petitions filed, the case is not 100% over until the Supreme Court rules. If the petition is granted and the Supreme Court reverses the lower court opinion, your client will be legally obligated to return the judgment recently paid by my client." Based upon the numerous conversations between counsel, the Motion for Stay, and the quoted letter, it is clear the payment (1) was involuntary, (2) does not represent an abandonment of the right to file a Petition or a settlement of the case, and (3) does not moot this case.

The petitioner was unequivocal at all times, both before and after payment of the non-pecuniary judgment, that the Petition would be filed with the Supreme Court of the United States. While the satisfaction of judgment acknowledges payment by petitioner to respondent, the satisfaction is not a part of the State Court record, and the judgment is still recorded in St. Mary Parish, Louisiana.[2] The respondent is simply wrong in her asserted facts as well as her analysis of the law.

A recent case squarely on point is *Exxon Mobil Corp. v. Grefer*, 549 U.S. 1249 (2007), which originated in Louisiana and involved a $112,290,000 punitive damage judgment against Exxon Mobil in Louisiana State Court. Following the ruling by the Louisiana Fourth Circuit Court of Appeal, the parties applied for Writs of Certiorari to the Louisiana Supreme Court, which were denied. Thereafter, Exxon Mobil moved to stay execution of the $112 million dollar punitive damage judgment with the Louisiana Supreme Court, pursuant to Louisiana Code of Civil Procedure article 2166 E, and with the U.S. Supreme Court. Both the Louisiana Supreme Court and the U.S. Supreme Court denied Exxon Mobil's Motion for Stay of Execution. In *Grefer v. Alpha Technical, et al.*, 965 So.2d 511, 514 (La. App. 4th Cir. 2007), the Louisiana appellate court, on remand from the U.S. Supreme Court, noted the

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[2] The respondent's Exhibits 2 and 3 do not reflect a filing date because the exhibits have never been filed in the State Court Record. The judgment is still recorded in St. Mary Parish, Louisiana.

denial of Exxon Mobil's motions for stay. Following the denials of the motions for stay, Exxon Mobil paid the punitive damage judgment pending its Petition to this court which was ultimately granted. The payment of the punitive damage judgment by Exxon Mobil following denial of the motions for stay of execution did not foreclose Exxon Mobil's right to file a Petition and usurp this court's jurisdiction. The case was not moot following payment of the judgment.

For the same reasons herein, petitioner's payment of the non-pecuniary damage judgment following denial of a Motion for Stay of Execution does not make the case moot. The Supreme Court of the United States has jurisdiction. There is no evidence petitioner agreed to settle or abandon its right to proceed before this Court.

Respectfully submitted,

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